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Office of Administrative Law Judges
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Issue Date: 21 October 2005

In the Matter of:

ROBERT D. RUSSELL,
Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Case No. 2004-BLA-6113

Appearances:

Ron Carson
Stone Mountain Health Services
St. Charles, Virginia
For the Claimant

Donna Sonner, Esquire
Office of the Solicitor
Nashville, Tennessee
For the Director, OWCP

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. The Act and implementing regulations, 20 C.F.R. Parts 410, 718, 725 and 727, provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and regulations define pneumoconiosis, commonly known as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b); 20 C.F.R. § 718.201 (2005). In this case, the Claimant, Robert D. Russell, alleges that he is totally disabled by pneumoconiosis.

I conducted a hearing on this claim on March 30, 2005, Knoxville, Tennessee. Both parties were afforded a full opportunity to present evidence and argument, as provided in the

Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2005). At the hearing, Claimant was the only witness. Transcript ("Tr.") at 14–30. Director's Exhibits ("DX") 1–24; Claimant's Exhibits ("CX") 1–9; and Administrative Law Judge's Exhibit ("ALJ") 1 were admitted into evidence without objection. Tr. at 7–8, 11. The record was held open after the hearing to allow the parties to submit additional evidence and argument. I hereby admit the following additional exhibits which have been submitted timely by the Director: Dr. Barrett's rereadings of the July 6, 2004 x-ray (DX 25) and of the October 14, 2002 x-ray (DX 26). No party submitted closing arguments, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits admitted into evidence, the testimony at hearing, and the arguments of the parties.

PROCEDURAL HISTORY

The Claimant filed this, his initial claim, on September 27, 2002. DX 2. The claim was denied by the District Director of the Office of Workers' Compensation Programs ("OWCP") on June 20, 2003, on the grounds that the evidence did not show that Claimant had pneumoconiosis, or pneumoconiosis that was caused by coal mine work, or that Claimant was totally disabled. Claimant requested a formal hearing by letter dated February 4, 2004. DX 22.

APPLICABLE STANDARDS

This claim was filed after March 31, 1980, and after January 19, 2001, the effective date of the current regulations. For this reason, the current regulations at 20 C.F.R. Parts 718 and 725 apply. 20 C.F.R. §§ 718.2 and 725.2 (2005). In order to establish entitlement to benefits under Part 718, Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§ 718.1, 718.202, 718.203 and 718.204 (2005).

ISSUES

The issues contested by the Director are:

1. How long the Claimant worked as a miner;

2. Whether the Claimant has pneumoconiosis as defined by the Act and the regulations;

3. Whether his pneumoconiosis arose out of coal mine employment;

4. Whether he is totally disabled; and

5. Whether his total disability is due to pneumoconiosis.

DX 23; Tr. 5.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Claimant's Testimony

Mr. Russell testified that he has an eighth grade education and that he began working in coal mine employment in 1968. Tr. at 15–16. He hauled raw coal for Waco, Inc. using a front end loader, taking it from the ground, and then driving it to the crusher. Tr. at 16–17. He worked at Waco from 1968 until 1975, and then returned in 1980 and continued until 1984. Tr. at 18–19. Mr. Russell also hauled coal for C&C Trucking. Tr. 19–21. He testified that he stopped working in 1997. Tr. at 22. His last coal mine employment took place in Tennessee. DX 3, 4. Therefore, this claim is governed by the law of the Sixth Circuit. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (*en banc*).

Mr. Russell testified that he is treated by Dr. Meece for his breathing problems and that Dr. Meece has prescribed oxygen, nebulizing treatments, and an inhaler. Tr. at 23–24. Mr. Russell stated that he smoked two packs of cigarettes a day for 40 years and that he quit in 1996. Tr. at 25. He had a heart attack in 1996 and takes medication for his heart problems and for high blood pressure. Tr. at 26–28.

Mr. Russell married his wife in 1968, and they remain married. DX 14; Tr. at 15. I find that the Claimant's wife is his only dependent for purposes of augmentation of benefits under the Act.

Length of Employment

According to the employment histories that Mr. Russell submitted to the Department of Labor and according to his Social Security records, Mr. Russell began working in the mines in 1968.

In a form dated January 28, 2003, Mr. Russell reported that he worked for Waco, Inc. as follows: "1968–1984 four full years other years only part time." DX 11. He wrote that he did not always work full time "because of other reasons." He picked up coal from the deep mines and strip pits using a front end loader. He wrote that when working at Waco he hauled only coal. In another form dated October 2, 2002, he wrote that he hauled coal 95% of the time. DX 11. Mr. Russell has submitted several co-worker and other employer statements corroborating this information. These are summarized below.

In a notarized letter dated July 24, 2003, Joan Cox wrote that she was the former office manager/payroll clerk for Waco, Inc. from 1966 until 1984. She wrote that Mr. Russell worked at Waco, Inc. from the late sixties until the mid-seventies, and then again from 1980 until 1984. Ms. Cox wrote that Mr. Russell hauled raw coal from the strip pits to the tipple and that "[a]ll of the coal hauled from the mines was non-processed coal, and was then processed at these two sites." DX 6. In an undated, unnotarized letter, Ms. Cox reiterated that Mr. Russell worked at "various times" between the years of 1969 and 1984. DX 6.

In a letter dated January 20, 2004, Bill E. Forkum the former president and general manager of Waco, Inc., wrote that Mr. Russell was employed by Waco, Inc. as a truck driver for 10–12 years, and that 90% of that employment involved hauling non-processed coal from strip pits and deep mines to the tipple. DX 7. In a notarized form dated June 24, 2004, Bill E. Forkum wrote that Mr. Russell worked at Waco, Inc. from late 1968 until mid-1975 and then from early 1980 until March 1984. Mr. Forkum again wrote that "90% of his employment was spent hauling non-processed coal from various strip pits and deep mines." CX 8.

In a notarized form dated July 28, 2004, Douglas Raymond Duncan, part-owner of Oliver Springs Mining, wrote that he had a contract with Waco, Inc. and that Mr. Russell "Loaded and Hauled Unprossed [sic] coal From Deep Mine # 5, & 8 to a Washer Plant" in the New River area of Tennessee. CX 8.

In a notarized form dated November 23, 2004, Ligh Duncan wrote that he worked at Waco, Inc. from November 1970 until March 1983 and that when he began working at Waco, Inc., Mr. Russell was already employed there. Mr. Duncan wrote that Mr. Russell "loaded and hauled Non [sic] processed coal during that time." CX 8.

In another form dated January 28, 2003, Mr. Russell reported that he worked for Charles Wayne Hickman and C&C Trucking in the years between 1976 and 1997. Mr. Russell wrote that during this employment he hauled coal 95% of the time using a front end loader. He characterized the years as: "approximately 4½ years." DX 10. In another form dated October 8, 2002, Mr. Russell wrote that he worked at C&C from 1994 until 1997, and that he spent 90% of the time hauling coal. DX 10.

In a notarized statement dated July 7, 2003, Mr. Russell wrote as follows:

> I hauled un processed [sic] coal from a stock yard in East Berdstant Kentucky to the Y-12 plant in Oak Ridge TN. [sic] in 1994, 1995, 1996, 1997. I also hauled un processed [sic] coal from a strip pit in Jamestown, TN. [sic] to Harriman and Rockwood. You will find below signatures of different individuals who I worked with and can verify that this coal was not cleaned and was un processed [sic] as stated before in the coal driver questionnaire I filled out in Oct. 2002.

DX 5, 17. Three different people signed this letter. The names are fairly illegible, but they appear to be John Ollis, Woody Duncan, and someone with the last name of Russell. DX 5, 17. Presumably, this notarized statement refers to the trucking job that Mr. Russell performed with Charles Wayne Hickman and C&C Trucking as the years coincide.

I find that the evidence regarding Mr. Russell's employment at Waco, Inc. and C&C Trucking is credible and supported by the statements of his coworkers and employers. It is also corroborated by the Social Security records. DX 12, 13. The earnings from this employment are calculated below.

In order to calculate the number of years of Mr. Russell's coal mine employment, I refer to § 725.101(a)(32) which provides that a "year" means: "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" This section also provides that:

> If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of actual number of days worked to 125.

§ 725.101(a)(32)(i).

This section also provides that "to the extent the evidence permits, the beginning and ending dates of coal mine employment shall be ascertained." § 725.101(a)(32)(ii). This section further provides:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, than the adjudication officer may use the following formula: divide the yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

§ 725.101(a)(32)(iii).

The Bureau of Labor Statistics does not actually provide the necessary data described in the regulations. Therefore, I rely on the BLBA Procedure Manual 2-700.11a and 2-700.14a(3) (made part of the record as "ALJ 1" pursuant to § 725.101(a)(32)(iii)) to determine Mr. Russell's coal mine employment. The table provided in this section indicates the average yearly and average daily earnings for coal miners. I compare this to Mr. Russell's history of earnings from the Social Security records, various employer/coal company statements and records, and Mr. Russell's application, to calculate the length of his coal mine employment. The application of the above-described formula to the present facts is as follows:

Year	Company	Daily average earnings ÷ (BLBA)	Total Days/ Years
1968	Waco, Inc.	$944.25 ÷ $30.41	31 days
1969	Waco, Inc.	$1,421.51 ÷ $34.09	42 days
1970	Waco, Inc.	$4,230.30 ÷ $38.22	111 days

1971	Waco, Inc.	$106.80 ÷ $40.07	3 days
1972	Waco, Inc.	$2,251.41 ÷ $44.61	50 days
1973	Waco, Inc.	$3,251.81 ÷ $47.19	69 days
1975	Waco, Inc.	$3,839.49 ÷ $59.24	65 days
1976	C&C Trucking	$1,781.25 ÷ $64.07	28 days
1977	C&C Trucking	$221.50 ÷ $71.90	3 days
1980	Waco, Inc.	$9,683.53 ÷ $87.42	111 days
1981	Waco, Inc.	$15,498.20 (*Exceeds yearly average*)	1 year
1982	Waco, Inc.	$17,267.58 (*Exceeds yearly average*)	1 year
1983	Waco, Inc.	$7,149.99 ÷ $109.76	65 days
1984	Waco, Inc.	$56.76 ÷ $118.40	½ day
1994	C&C Trucking	$16,352.15 ÷ $142.08	115 days
1995	C&C Trucking	$20,626.35 (*Exceeds yearly average*)	1 year
1996	C&C Trucking	$20,296.40 (*Exceeds yearly average*)	1 year
1997	C&C Trucking	$18,614.84 ÷ $152.08	122 days
TOTAL			**10.5 years**

Based on Social Security earnings records, coal mine employer records, Mr. Russell's own testimony, and coworker's testimonials, I find that the Claimant has established 10.5 years in coal mine employment.

Medical Evidence

Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The following table summarizes the x-ray findings available in connection with this case.[1]

The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b) (2005). Any such readings are therefore included in the "negative" column. X-ray interpretations which make no reference to pneumoconiosis, positive or negative, given in connection with review of an x-ray film solely to determine its quality, are listed in the "silent" column.

[1]Another x-ray, Dr. Ahmed's taken July 7, 2003, is in the record at DX 17. The Claimant is not relying upon it, and I have not considered it, as including it would exceed the evidentiary limits found in 20 CFR § 725.414.

Physicians' qualifications appear after their names. Qualifications have been obtained where shown in the record by curriculum vitae or other representations, or if not in the record, by judicial notice of the lists of readers issued by the National Institute of Occupational Safety and Health (NIOSH), and/or the registry of physicians' specialties maintained by the American Board of Medical Specialties.[2] If no qualifications are noted for any of the following physicians, it means that either they have no special qualifications for reading x-rays, or I have been unable to ascertain their qualifications from the record, the NIOSH lists, or the Board of Medical Specialties. Qualifications of physicians are abbreviated as follows: A = NIOSH certified A reader; B = NIOSH certified B reader; BCR = board-certified in radiology. Readers who are board-certified radiologists and/or B readers are classified as the most qualified. See *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n.16 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B readers need not be radiologists.

Date of X-ray	Read as Positive for Pneumoconiosis	Read as Negative for Pneumoconiosis	Silent as to the Presence of Pneumoconiosis
10/14/02	CX 1 Pathak/BCR, B 2/2	DX 26 Barrett/BCR, B	
12/04/02	DX 16 Hughes 1/1 Quality "2"	DX 24 Barrett/BCR, B Quality "3"	DX 16 Goldstein/B Quality "unreadable"
02/26/03	DX 16 Hughes 1/1 Quality "1" CX 9 Alexander/BCR, B 2/1 Quality "2"	DX 16 Barrett/BCR, B Quality "2"	DX 16 Goldstein/B Quality "3"
07/06/04	CX 2 Pathak/BCR, B 1/2	DX 25 Barrett/BCR, B	

[2]NIOSH is the federal government agency that certifies physicians for their knowledge of diagnosing pneumoconiosis by means of chest x-rays. Physicians are designated as "A" readers after completing a course in the interpretation of x-rays for pneumoconiosis. Physicians are designated as "B" readers after they have demonstrated expertise in interpreting x-rays for the existence of pneumoconiosis by passing an examination. Historical information about physician qualifications appears on the U.S. Department of Health and Human Services, List of NIOSH Approved B Readers with Inclusive Dates of Approval [as of] June 7, 2004, found at http://www.oalj.dol.gov/public/blalung/refrnc/bread3_07_04.htm. Current information about physician qualifications appears on the CDC/NIOSH, NIOSH Certified B Readers List found at http://www.cdc.gov/niosh/topics/chestradiography/breader-list.html. Information about physician board certifications appears on the web-site of the American Board of Medical Specialties, found at http://www.abms.org.

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. Where there is greater resistance to the flow of air, the lung impairment is more severe. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

The following chart summarizes the results of the pulmonary function studies available in this case.[3] "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 C.F.R. § 718.204(b)(2)(i) (2005).

Ex. No. Date Physician	Age Height[4]	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify?	Physician Impression
DX 16 12/04/02 Hughes	63 69"	1.56	1.96	80	34	Yes	Mild restrictive physiology; mild airflow obstruction; diffusion capacity [within normal limits?] when corrected for alveolar volume.
CX 3 02/03/04 Narayanan	64 69"	1.50	1.91	79	20	Yes	Good effort and comprehension; severe restriction.

[3] Another the pulmonary function study from October 11, 2002 is also in evidence at DX 17. However, Dr. Michos invalidated it in a report dated December 16, 2003, DX 18, and the parties do not rely upon it. Hence I have not considered the results of this study.

[4] The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116 (4th Cir. 1995). As there is a variance in the recorded height of the miner from *" to *", I have taken the mid-point (*") in determining whether the studies qualify to show disability under the regulations. *None of the tests are qualifying to show disability whether considering the average height, or the heights listed by the persons who administered the testing.

Ex. No. Date Physician	Age Height[4]	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify?	Physician Impression
CX 4 02/22/05 Narayanan	65 69"	1.71	2.11	81	47	Yes	Good effort and comprehension; moderately severe restriction.

Although he noted suboptimal MVV performance, Dr. John Michos validated the results of the December 4, 2002 pulmonary function study in a report dated December 16, 2003, DX 16. Dr. Michos is board-certified in internal medicine and pulmonary disease.

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (pO_2) and the percentage of carbon dioxide (pCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled.

The following chart shows the results of the only arterial blood gas study available in this case. A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b) (2005).

Exhibit Number	Date	Physician	PCO_2 at rest/ exercise	PO_2 at rest/ exercise	Qualify?	Physician Impression
DX 16	12/04/02	Hughes	51	62	Yes	Chronic respiratory acidosis; increased Aa gradient

Dr. Michos validated the results of the December 4, 2002 arterial blood gas study in a report dated January 14, 2003. DX 16.

Medical Opinions

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, whether the miner is totally disabled, and whether pneumoconiosis caused the miner's disability. A determination of the existence of pneumoconiosis may be made if a physician, exercising

sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 C.F.R. §§ 718.202(a)(4) (2005). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 C.F.R. § 718.202(a)(4) (2005). Where total disability cannot be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. 20 C.F.R. § 718.204(b)(2)(iv) (2005). The cause or causes of total disability must be established by means of a physician's documented and reasoned report. 20 C.F.R. § 718.204(c)(2) (2005). The record contains the following medical opinions relating to this case.

Dr. Terrence Meece treated Mr. Russell at the Stone Mountain Clinic frequently and regularly in the time period of October 2002 and December 2004, often multiple times in a month. CX 6. Dr. Meece's numerous notes reflect diagnoses of severe COPD, severe COPD with right side heart failure, and diabetes. The notes are replete with references to decreased breath sounds on examination of Mr. Russell's lungs and the fact that he was on supplemental oxygen. A note from November 3, 2003 reflects as follows:

> Patient in today for a recheck on his legs. He has taken different antibiotics. Over the weekend he has continued with redness, swelling, and drainage from the areas of ulcers on his legs. He is not real compliant with keeping his legs elevated, and it is very difficult to treat this. I suspect some of this is heart failure with his COPD.

CX 6. A note from October 2002 reflects that Mr. Russell went to the emergency room with exacerbation of his COPD. Those hospital records are not in evidence.

Dr. Meece submitted a letter dated February 23, 2005 in which he rendered the following opinion:

> Mr. Russell suffers from COPD, which I believe is a combination of working in the coal mines and smoking cigarettes. He has severe COPD and is on oxygen on a chronic basis now. His condition is due, in part, to the coal dust exposure and part due to smoking and I find it would be very difficult to determine which of these caused the greatest amount of damage to his lungs.

CX 7.

In a letter dated March 29, 2004, Kellie Brooks wrote that Mr. Russell came in Stone Mountain Health Clinic for a physical examination. Ms. Brooks is a board-certified nurse practitioner.[5] She reported a coal mine employment history of 16 years and described that Mr. Russell had loaded and hauled coal. She reported that Mr. Russell was on home oxygen and that he experiences cough when the weather is very hot or very cold, and complains of shortness of breath on exertion, and orthopnea. She noted chronic edema and chronic venous stasis. She wrote that Mr. Russell had a 42 year smoking history and assessed him as having COPD. CX 5.

A consultation report by Dr. Metcalf while Mr. Russell had been in the Methodist Medical Center in November 2003 reflects that Mr. Russell's past medical history included the following diagnosis: "chronic obstructive pulmonary disease with pneumoconiosis on oxygen therapy." CX 6.

Dr. Hal Hughes examined Mr. Russell on behalf of the Department of Labor on December 4, 2002. DX 16. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, blood gas studies and pulmonary function testing. Dr. Hughes reported that Mr. Russell worked in the mines for 10 years. He reported a smoking history of 2 packs per day for 43 years. The chest examination was within normal limits. Dr. Hughes read the x-ray as showing hyperinflation, cardiomegaly, mild increased interstitial marking, and non-specific pleural findings.[6] The pulmonary function test showed "mild restrictive physiology" attributable to obesity and mild airflow obstruction. The arterial blood gas study revealed chronic respiratory acidosis and increased Aa gradient. Dr. Hughes diagnosed chronic respiratory acidosis; cardiomegaly; increased Aa gradient; and mild interstitial markings. Dr. Hughes concluded that the etiologies of these conditions included: known OSA [obstructive sleep apnea] with Pickwickian syndrome; known COPD with prior heavy tobacco abuse; coal dust exposure; and morbid obesity. DX 16. He wrote that Mr. Russell had a significant respiratory impairment related to COPD/OSA, but that it was "impossible to determine if coal dust vs. tobacco abuse (previously) responsible for increased interstitial markings." DX 16. Dr. Hughes concluded only that he "cannot determine" how the diagnosed conditions contributed to any existing respiratory impairment.

Existence of Pneumoconiosis

The regulations define pneumoconiosis broadly:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

[5]This letter from Kellie Brooks, a nurse practitioner, is not a physician opinion and I do not consider it as such. Her record is meaningful, however, in that it reflects Claimant's social, occupational, and medical history as it was known to the Stone Mountain Health Services.

[6]On the actual December 14, 2002 x-ray report, Dr. Hughes found pneumoconiosis "1/1." In his examination report, however, he made no such definitive finding. In any event, I have found that the December 14, 2002 chest x-ray film is of no probative value because of its poor quality.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (2005). In this case, Mr. Russell's medical records indicate that he has been diagnosed with chronic obstructive pulmonary disease, which can be encompassed within the definition of legal pneumoconiosis. 20 C.F.R. § 718.201 (2005); *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co*., 60 F.3d 173 (4th Cir. 1995). However, only chronic obstructive pulmonary disease caused by coal dust constitutes legal pneumoconiosis. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 515 (6th Cir. 2003).

20 C.F.R. § 718.202(a) (2005) provides that a finding of the existence of pneumoconiosis may be based on (1) chest x-ray, (2) biopsy or autopsy, (3) application of the presumptions described in Sections 718.304 (irrebuttable presumption of total disability if there is a showing of complicated pneumoconiosis), 718.305 (not applicable to claims filed after January 1, 1982) or 718.306 (applicable only to deceased miners who died on or before March 1, 1978), or (4) a physician exercising sound medical judgment based on objective medical evidence and supported by a reasoned medical opinion. There is no evidence that Mr. Russell has had a lung biopsy, and, of course, no autopsy has been performed. None of the presumptions apply, because the evidence does not establish the existence of complicated pneumoconiosis, Mr. Russell has less than 15 years of work in coal mines and filed his claim after January 1, 1982, and he is still living. In order to determine whether the evidence establishes the existence of pneumoconiosis, therefore, I must consider the chest x-rays and medical opinions. As this claim is governed by the law of the Sixth Circuit, the Claimant may establish the existence of pneumoconiosis under any one of the alternate methods set forth at Section 202(a). *See Cornett*

v. Benham Coal Co., 227 F.3d 569, 575 (6th Cir. 2000); *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (*en banc*).

Pneumoconiosis is a progressive and irreversible disease. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314–315 (3rd Cir. 1995); *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 803 (4th Cir. 1998); *Woodward v. Director, OWCP*, 991 F.2d 314, 320 (6th Cir. 1993). As a general rule, therefore, more weight is given to the most recent evidence. See *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 151–152 (1987); *Eastern Associated Coal Corp. v. Director, OWCP*, 220 F.3d 250, 258-259 (4th Cir. 2000); *Crace v. Kentland-Elkhorn Coal Corp*., 109 F.3d 1163, 1167 (6th Cir. 1997); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 602 (3rd Cir. 1989); *Stanford v. Director, OWCP*, 7 B.L.R. 1-541, 1-543 (1984); *Tokarcik v. Consolidated Coal Co*., 6 B.L.R. 1-666, 1-668 (1983); *Call v. Director, OWCP*, 2 B.L.R. 1-146, 1-148–1-149 (1979). This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Woodward*, 991 F.2d at 319–320; *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992); *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-600 (1984).

The October 14, 2002 x-ray was read as positive by a dually-qualified radiologist and as negative by a dually-qualified radiologist. As equally qualified readers found pneumoconiosis to be both present and absent, I find that the readings of this x-ray are in equipoise.

The December 4, 2002 x-ray was found to be "unreadable" by Dr. Goldstein, a B-reader, and as quality "3" by Dr. Barettt, a dually-qualified radiologist. Dr. Hughes read this film as quality "2," but also interpreted it as positive for pneumoconiosis "1/1." As a better qualified radiologist made no findings of pneumoconiosis and, as this radiologist and another B-reader reported that the film quality was "3" or worse, I find that this film lacks probative value. *See Gober v. Reading Anthracite Co.*, 12 B.L.R. 1-67, 1-70 (1988) (suggesting that x-ray films that are quality "3" or found to be unreadable may be accorded little or no probative weight).

The February 26, 2003 x-ray was read as positive by one dually-qualified radiologist and as negative by one dually-qualified radiologist, both of whom found the quality to be "2." Dr. Hughes read the film as positive for pneumoconiosis 1/1, and determined that the quality was "1". Dr. Goldstein read the film for quality only and rated it as a "3." As at least two radiologists determined that the quality was "2", I find that the film has probative value. In addition, as more physicians read it to be positive, I find that this film is positive for pneumoconiosis.

The July 6, 2004 x-ray was read as positive by a dually-qualified radiologist and as negative by a dually-qualified radiologist. As equally qualified readers found pneumoconiosis to be both present and absent, I find that the readings of this x-ray are in equipoise.

In summary, I find that one x-ray film lacks probative value and does not weigh in favor or against a finding of pneumoconiosis, two films are in equipoise, and one of the most recent films is positive. I find that the x-ray readings that are in equipoise do not detract from the positive February 2003 x-ray. I find that the Claimant has established the presence of pneumoconiosis via x-ray evidence.

I must next consider the medical opinions. Mr. Russell can establish that he suffers from pneumoconiosis by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co*., 8 B.L.R. 1-65, 1-66 (1985); *Hess v. Clinchfield Coal Co*., 7 B.L.R. 1-295, 1-296 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127, 1-1129 (1984). A "reasoned" opinion is one in which the judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Whether a medical report is sufficiently documented and reasoned is for the judge to decide as the finder-of-fact; an unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149, 1-155 (1989) (*en banc*). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp*., 6 B.L.R. 1-1291, 1-1294 (1984). A physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v. Mathies Coal Co*., 6 B.L.R. 1-1182, 1-1184 (1984). An opinion may be given little weight if it is equivocal or vague. *Griffith v. Director, OWCP*, 49 F.3d 184, 186-187 (6th Cir. 1995); *Justice v. Island Creek Coal Co*., 11 B.L.R. 1-91, 1-94 (1988); *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236, 1-239 (1984).

The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-599 (1984). More weight may be accorded to the conclusions of a treating physician as he or she is more likely to be familiar with the miner's condition than a physician who examines him episodically. *Onderko v. Director, OWC*P, 14 B.L.R. 1-2, 1-6 (1989). However, a judge "is not required to accord greater weight to the opinion of a physician based solely on his status as the Claimant's treating physician. Rather, this is one factor which may be taken into consideration in … weighing … the medical evidence …" *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-105 (1994). Factors to be considered in weighing evidence from treating physicians include the nature and duration of the relationship, and the frequency and extent of treatment. In appropriate cases, a treating physician's opinion may be give controlling weight, provided that the decision to do so is based on the credibility of the opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. § 718.104(d) (2005). The Sixth Circuit has interpreted this rule to mean that

> in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade … For instance, a highly qualified treating physician who has lengthy experience with a miner may deserve tremendous deference, whereas a treating physician without the right pulmonary certifications should have his opinions appropriately discounted. The case law and applicable regulatory scheme make clear that ALJs must evaluate treating physicians just as they consider other experts.

Eastover Mining Co. v. Williams, 338 F.3d 501, 513 (6th Cir. 2003) (citations omitted). In this case, Mr. Russell identified Dr. Meece as his current treating physician, and Dr. Meece has submitted both treatment records and an opinion. According to the evidence he saw Mr. Russell quite frequently since October 2002 and has specifically treated his pulmonary condition.

In any event, essentially every physician who rendered an opinion has determined that Mr. Russell has COPD from his coal mine employment. Dr. Meece diagnosed COPD due to coal mine employment. Dr. Hughes, the physician who examined him on behalf of the Director, diagnosed four conditions, one of which was COPD, and attributed it in part to coal mine dust exposure. I find that the evidence that Mr. Russell had COPD arising from coal mine employment is overwhelmingly positive and this is equivalent to a finding of legal pneumoconiosis. Therefore, the Mr. Russell has established that he has pneumoconiosis on the basis of the physician opinion evidence.

In weighing the x-ray and medical opinion evidence both separately and together, I find that the Claimant has established the presence of pneumoconiosis.

Causal Relationship Between Pneumoconiosis and Coal Mine Employment

The Act and the regulations provide for a rebuttable presumption that pneumoconiosis arose out of coal mine employment if a miner with pneumoconiosis was employed in the mines for ten or more years. 30 U.S.C. § 921(c)(1); 20 C.F.R. § 718.203(b) (2005). As I have found that Mr. Russell was employed as a miner for at least ten years, he is entitled to the presumption. Although it appears that Dr. Hughes was uncertain as to whether Mr. Russell's "increased interstitial markings" were due to tobacco abuse or coal mine dust, he appears to have unequivocally attributed Mr. Russell's COPD to coal mine dust exposure. I find, therefore, that the § 718.203(b) presumption has not been rebutted.

In sum, the Claimant has established that his pneumoconiosis arose from coal mine employment.

Total Respiratory Disability

A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 C.F.R. § 718.304 (2005), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. § 902(f), 20 C.F.R. § 718.204(b) and (c) (2005). The regulations provide five methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 C.F.R. § 718.204(b) and (d) (2005). Lay testimony may only be used in establishing total disability in cases involving deceased miners, and in a living miner's claim, a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 C.F.R. § 718.204(d) (2005); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994). There is no evidence in the record that Mr. Russell suffers from

complicated pneumoconiosis or cor pulmonale.[7] Thus I will consider pulmonary function studies, blood gas studies and medical opinions. In the absence of contrary probative evidence, evidence from any of these categories may establish disability. If there is contrary evidence, however, I must weigh all the evidence in reaching a determination whether disability has been established. 20 C.F.R. § 718.204(b)(2) (2005); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986).

All of the pulmonary function studies of record produced qualifying results. The most recent test results were validated by Dr. John Michos. I find that the pulmonary function studies of record overwhelmingly support a finding of total respiratory disability.

In regard to the arterial blood gas study of record, it also produced qualifying results. Dr. Michos also validated the results of this test. I find that the arterial blood gas study evidence also supports a finding of total respiratory disability.

Finally, in regard to the physician opinion evidence, Dr. Hughes diagnosed Mr. Russell as having a "significant respiratory impairment related to COPD/OSA." DX 16. Dr. Meece rendered no opinion as to whether Mr. Russell's condition precluded him from performing his previous coal mine employment, other than to say that Mr. Russell's COPD is "severe" and that he is "on oxygen on a chronic basis now." CX 7. Therefore, while none of the physicians specifically addressed whether Mr. Russell could perform his previous coal mine work, all concur that his pulmonary condition is "significant" and "severe." When these opinions are considered in conjunction with the results of the qualifying objective tests, I conclude that the Claimant has established the presence of a total respiratory impairment.

Causation of Total Disability

In order to be entitled to benefits, the Claimant must establish that pneumoconiosis is a "substantially contributing cause" to his disability. A "substantially contributing cause" is one which has a material adverse effect on the miner's respiratory or pulmonary condition, or one which materially worsens another respiratory or pulmonary impairment unrelated to coal mine employment. 20 C.F.R. § 718.204(c) (2005); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 610 (6th Cir. 2001).

The Benefits Review Board has held that § 718.204 places the burden on the claimant to establish total disability due to pneumoconiosis by a preponderance of the evidence. *Baumgardner v. Director, OWCP*, 11 B.L.R. 1-135 (1986). Nothing in the commentary to the new rules suggests that this burden has changed; indeed, some language in the commentary indicates it has not changed. *See* 65 Fed. Reg. at 79923 (2000) ("Thus, a miner has established that his pneumoconiosis is a substantially contributing cause of his disability if it either has a material adverse effect on his respiratory or pulmonary condition or materially worsens a totally disabling respiratory or pulmonary impairment …").

[7]Dr. Meece suspected that some of Claimant's heart failure was due to COPD, and he also made reference to right-sided heart failure in his office notes. He made no explicit finding of cor pulmonale with right-sided heart failure, however.

Turning to the physician opinions of record, Dr. Meece opined that "it would be very difficult to determine [whether smoking cigarettes or coal mine dust exposure] caused the greatest amount of damage to his lungs." I infer from this statement that while Dr. Meece cannot determine which contributed the *most*, he is of the opinion that both tobacco abuse and coal mine dust exposure contributed in more than a minimal way. Dr. Hughes opined only that he "c[ould]not determine" the extent to which any of Mr. Russell's diagnoses contributed to his pulmonary impairment. I cannot infer anything from this statement, but I do not find that it detracts from Dr. Meece's opinion which weighs in favor of finding that Mr. Russell's total disability is due to pneumoconiosis.

Accordingly, I find that the Claimant has established that his total disability is due to pneumoconiosis on the basis of Dr. Meece's opinion.

Date of Entitlement

In the case of a miner who is totally disabled due to pneumoconiosis, benefits commence with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits begin with the month that the claim was filed. 20 C.F.R. § 725.503(b) (2005). Mr. Russell filed his claim for benefits in September 2002. The earliest available pulmonary function and arterial blood gas studies, performed in December 2002, were both qualifying for disability. I infer from this that he was already disabled by the time he filed his claim, but the exact month cannot be determined from the evidence in the record. Therefore, I find that he is entitled to benefits commencing as of September 2002, the month in which he filed his claim. Benefits are to be augmented for Mr. Russell's dependent spouse.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

Having considered all of the relevant evidence, I find that the Claimant has established that he has pneumoconiosis arising out of his coal mine employment, and that he has a totally disabling pulmonary or respiratory impairment caused by his coal workers' pneumoconiosis. Therefore, the Claimant has met his burden of proving all of the necessary elements of entitlement pursuant to the Act. Accordingly, he is entitled to benefits.

ORDER

The claim for benefits filed by Robert D. Russell on September 27, 2002 is hereby GRANTED.

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ALICE M. CRAFT
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, United States Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, United States Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).